

IT IS SO ORDERED.

Dated: April 02, 2007
11:17:31 AM


Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

BRIAN DALE THARP,

Debtor.

CASE NUMBER 06-41812

HONORABLE KAY WOODS

ORDER DENYING MOTION TO DISMISS

This cause is before the Court on Motion of United States Trustee ("UST") to Dismiss Case Pursuant to 11 U.S.C. Section 707(b)(2) and (b)(3) ("Motion to Dismiss") filed on February 8, 2007. Although Debtor Brian Dale Tharp ("Debtor") filed no response brief to the Motion to Dismiss, he amended Schedule J on March 7, 2007 to reflect post-petition changes in his current expenses.

At the hearing on the Motion to Dismiss conducted on March 15, 2007, counsel for UST limited her argument to the second part of the Motion to Dismiss premised upon § 707(b)(3), in light of the

Court's Memorandum Opinion in *In re Zak*, 06-41241 (January 12, 2007). The Court invited the parties to submit supplemental briefs on the issues raised at the hearing; however, neither party filed a supplemental brief.

Section 707 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") provides for dismissal of chapter 7 cases when there is a presumption of abuse. The presumption of abuse arises as a result of a detailed calculation of the debtor's income and expenses over the course of the six months preceding the filing of the petition ("means test"). See 11 U.S.C. § 707(b)(2).

In the event that the means test does not raise the presumption of abuse, or the presumption of abuse is successfully rebutted by the debtor, § 707(b)(3) provides an alternative rationale for dismissing the debtor's chapter 7 petition:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider--

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707 (West 2006). Courts and commentators alike have recognized that the § 707(b)(3) "totality of circumstances" analysis requires a bankruptcy court to undertake an analysis of a debtor's "actual debt paying ability" independent of the means test analysis under § 707(b)(2). *In re Mestemaker*, __ B.R. __, 2007 WL 79306 (Bankr. N.D. Ohio (January 10, 2007)); Hon. Eugene R. Wedoff,

Judicial Discretion to Find Abuse under 707(b)(3), 25 Am. Bankr. Inst. J. 1, 52 (2006). UST carries the burden of proof to demonstrate that dismissal is appropriate under § 707(b)(3). *In re Graham*, __ B.R. __, 2007 WL 685945 *7 (Bankr. S.D. Ohio (March 7, 2007)).

In his means test, Debtor included a mortgage payment on real estate ("surrendered real estate") in the amount of \$1,190.00 in his calculation of deductions.¹ Based upon the calculations in Debtor's means test, no presumption of abuse arose. Although this Court held in *In re Zak, supra*, that it is proper for debtors to include payments on secured debts in their means test even though they intend to surrender the subject property, this Court has not addressed the effect of the reduction in monthly expenses on Schedule J that will commonly result from the surrender of the subject property.

For instance, in this case Debtor originally listed the \$1,190.00 mortgage payment under "rent or home mortgage payment" as well as an additional \$488.00 in expenses for utilities and home maintenance² and \$61.00 for liability insurance for the surrendered real estate on Schedule J. Debtor's original Schedule J reflected a negative net monthly income of \$655.28.

In his Amended Schedule J, Debtor lists \$900.00 under "rent

¹The surrendered real estate was the subject of a Motion for Relief from Stay and Abandonment by Wells Fargo Financial Ohio 1, Inc., which was granted by the Court on January 10, 2007.

²Debtor listed monthly expenses of \$190.00 for electricity and heating fuel, \$100.00 for water and sewer, \$60.00 for telephone, \$100.00 for cable television, \$18.00 for garbage removal, and \$20.00 for home maintenance.

and home mortgage," with an additional \$285.00 for utilities.³ However, Debtor continues to list \$61.00 for liability insurance. At the hearing, Debtor explained that, although he is no longer living at the surrendered real estate, he is liable for any damage to the real estate prior to the sheriff's sale. In addition, Debtor explained that his medical and dental expenses have increased from \$100 to \$225 based upon anticipated surgery. Despite the reduction in Debtor's rent and home mortgage expenses, Amended Schedule J continues to reflect a negative net monthly income of \$287.28.

At the hearing, UST questioned the necessity of liability insurance, pointing out that Debtor was under no obligation to continue insuring the surrendered real estate.⁴ Furthermore, UST stated that she believed there would be "some left over disposable income despite [the increased medical expenses]."

Debtor responded that, even if he stopped paying the liability insurance, he would still have a negative net monthly income of \$226.28. Therefore, Debtor argued that dismissal of his petition pursuant to § 707(b)(3) was inappropriate because the totality of the circumstances does not reveal any abuse by Debtor. D e b t o r signed his Declaration concerning Amended Schedule J under penalty of perjury on March 7, 2007. He correctly argues that, even if he eliminated the expense of liability insurance on the surrendered

³Debtor lists monthly expense of \$210.00 for electricity and heating fuel and \$75.00 for telephone.

⁴The Court understands that, despite relief from stay in favor of Wells Fargo, Debtor remains liable for any damage to the property until a foreclosure or other sale is concluded. As a consequence, the expense for liability insurance on the surrendered real estate is reasonably necessary to protect Debtor.

real estate, he would still have a negative net monthly income. Moreover, although UST expressed the belief that there would be "some left over disposable income despite [the increased medical expenses]," she did not provide any calculation to demonstrate a positive net monthly income for Debtor. Finally, UST did not directly challenge the validity of Debtor's increased medical expenses⁵ (or, for that matter, any of the expenses listed in Amended Schedule J), nor did she request an evidentiary hearing to further investigate those expenses.

UST has failed to meet the burden of proof to show that, based upon the totality of the circumstances, Debtor's chapter 7 petition should be dismissed because of abuse. As a consequence, the Motion to Dismiss is denied.

⁵Since Amended Schedule J increased the medical expenses by \$125.00 per month, elimination of the increase would still result in a negative net monthly income of \$162.00.